BARCLAY SWITZERLAND - SUMMARY OF LEGAL ISSUES AND OUTCOME TO DATE

1. In applying the Swiss federal food law, the ODA (Ordonnance Fédérale sur les Denrées Alimentaires), there is a regulation governing constituent measurement and labelling. In the ODA of 18 October 1978, Article 420 letter C states that "every packet of cigarettes for sale to consumers must carry the smoke yields of tar and nicotine and these to be printed so that they are clearly visible and legible".

2. The application and control of these requirements are in the hands of the cantonal chemists who, with the agreement with the Federal Office of Public Health, deputed Dr. Romann and Dr. Aubort, cantonal chemists of the Cantons of Zurich and Vaud respectively, to be responsible for carrying out the necessary analyses.

3. Legally a manufacturer can launch a brand onto the Swiss market without having submitted it for prior testing to the cantonal chemist. However, the manufacturer bears full responsibility for the figures it prints on the packs, and should the cantonal chemist disagree with them in his testing then the onus is on the manufacturer to make the necessary changes.

4. In the case of Barclay, BAT had submitted the brand several months in advance to both cantonal chemists. They received the go-ahead from Dr. Romann for launching on the basis of marking the packs "1 mg tar and 0.2 mg nicotine determined by the standard method". This was communicated to BAT by Dr. Romann by letter of 23.07.82 and in a certificate of analysis of 26.07.82. It should be noted that Dr. Aubort distanced himself from Dr. Romann unofficially at the start and officially from the beginning of 1983.

5. Unlike the USA, where it was the FTC who took the legal action, in Switzerland it was 5 manufacturers who initiated these steps. They sought before a Geneva court (BAT being Geneva-based) "mesures provisionnelles" - which would require BAT to withdraw the product from the market - before proceeding with "procès à fond". The basis upon which the legal action was brought was unfair competition (concurrence déloyale). Barclays cheats the smoking machine. In other words the printed yields of tar or nicotine that result from testing using the standard method mislead the consumer.

6. Since numbers have been appearing on packs since 1978, the smoker has become used to the numbers as a scale of reference. Therefore, measured against this familiar scale, the Barclay numbers constitute misleading information being given to the smoker, and as such damage the credibility of the industry as a source of reliable consumer information.

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7. BAT, on the other hand, claimed that it was in fact the authority responsible for the implementation of ODA and for seeing that consumers were not mislead, who had given their authorization for the brand to be put on the market at "1 mg tar and 0.2 mg nicotine determined by the standard method". And they countered that the action of their competitors was solely inspired by market and economic considerations.

8. The Geneva court gave its judgement on April 6, 1983 ~~(copy attached)~~, which did not allow the request for a preliminary injunction. ~~However, the decision was immediately taken to pursue proceedings. A~~ main action is being brought to obtain a definite ban on the sale of Barclay indicating levels of 1 mg tar and 0.2 mg nicotine.

9. In fact, though the judges did not consider they were able to grant a preliminary injunction against the sale of Barclay, they nevertheless declared that an ambiguity remains. According to these judges, the existence of an act of unfair competition was a matter to be determined by the judge hearing the main action.

10. It should also be noted that the cantonal chemists are following their own procedures on this matter with BAT.

11. A new request for a preliminary injunction was made on May 6 1983, with the aim of preventing BAT from claiming in its press releases and press advertisements that the judge had stated that the consumer could utterly rely on the figures given for Barclay. This request was accepted by the Court which recorded " BAT's bad faith and off-hand behaviour".
A request for a full action was made on June 28 and this procedure is progressing normally.

12. In view of the new developments both in Switzerland and the USA, a new request for a preliminary injunction aimed at getting a ban on Barclay from the market with 1 mg "tar" was made on June 16. Because of the holiday period, the next hearing will take place September 21. It will mainly be concerned with procedure - the question being to find out whether the Court is able to order that the exchange of correspondence between BAT and the Vaudois Cantonal Chemist Dr Aubord be produced.

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3. Case Histories

3.3 Belgium

- May 9, 1983 decision given by the Commercial Tribunal, Brussels.

- Appeal lodged with the Brussels Court of Appeals on May 13, 1983 against the lower court decision.

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HOLLAND

Action being initiated on a misleading advertising approach

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